91-2036

(1)

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAVID L. WHALEN - PETITIONER

vs.

OFFICE OF PERSONNEL MANAGEMENT -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If an individual is an employee under the Federal Employees Compensation Act, 5 U.S.C. § 790 (b)(4) (1952) which limits the employee's rights of redress for injuries suffered as a result of his employment, should he also be eligible during his period of employment for ALL other benefits and rights as a Federal Employee including retirement credit ?

2. Is the clearly written and unambiguous statute [5 U.S.C. § 790 (b)(4)] and interpretive opinion, practice, and policy of the Department of Labor superior to the interpretive opinion, practice, and policy of the Office of Personnel Management which lacked statutory basis at the time (1954-8) ?

3. Was the preponderance of the evidence presented by the Petitioner sufficient to document that the appointment process followed by the Department of Commerce federal officials satisfied the requirements of "... appointed in the Civil Service" codified in 5 U.S.C. 2105 (a) and the United Sates Constitution, Article 2, Section 2, Clause 2 and that denial of employee status by the Office of Personnel Management and the United States Court of Appeals for the Federal Circuit was an unreasonable interpretation and unwarranted?

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1991

DAVID L. WHALEN - Petitioner

vs.

OFFICE OF PERSONNEL MANAGEMENT -

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Petitioner, David L. Whalen, pro se, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit (COAFC) affirming the Merit Systems Protection Board (MSPB) decision to deny granting the petitioner civil service retirement credit for service performed as a Cadet-Midshipman at the United States Merchant Marine Academy (USMMA) during the period of September 8, 1954 to August 1, 1958, when such denial was based on the erroneous Office of Personnel Management (OPM) interpretative opinion, practice and policy of U.S.C. 2105 (a) and contrary to clear statutory language and the interpretative opinion, practice and policy of the Department of Labor (DOL).

OPINIONS BELOW

The unpublished written opinion of the COAFC, Whalen v. OPM, 91-3438 appears in **Appendix A** to this Petition. The unpublished written opinion and Initial Decision of the MSPB, Atlanta Region, Whalen v. OPM, AT08319110083 appears as **Appendix B** to this Petition.

JURISDICTION

The COAFC Opinion was filed on March 17, 1992. The Petitioner filed a timely Petition for Rehearing on March 27, 1992. The COAFC denial of the Petition for Rehearing was issued on April 15, 1992 and is set forth in **Appendix C** to this Petition. The United States Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 790 (b) (4) (1952)

Recodified as 5 U.S.C. § 8101

Definition of "employee" under Federal Employees Compensation Act

".....persons rendering personal services of a kind similar to those civilian officers or employees of the United States to any department, independent establishment, or agency thereof (including instrumentalities of the United States wholly owned by it), without compensation or for nominal compensation, in any case in which acceptance or use of such services is authorized by an Act of Congress or in which provision is made by law for payment of the travel or other expenses of such person... "

5 U.S.C. § 693 (1952)

Definition of "employee" under Civil Service Retirement Act

(a) Employees Included

This Act shall apply to all officers and employees in or under the

executive, judicial, and legislative branches of the United States Government, and to all officers and employees of the municipal government of the District of Columbia, ...

5 U.S.C. § 2105 (a) (1966)

Current definition of "employee"

(1) Appointed in the Civil Service by one of the following acting in an official capacity -

.....

(d) An individual who is an employee under this section;

(2) Engaged in the performance of a federal function under authority of law or an Executive Act; and

(3) Subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

10 U.S.C. § 971 (b) (1) (1982)

... in computing the length of service for any purpose, no officer of the Navy or Marine Corps may be credited with service as a midshipman at the United States Naval Academy, or as a cadet at the United States Military Academy, United States Air Force Academy, or United States Coast Guard Academy, if he was appointed

as a midshipman or cadet after March 4, 1913

US Constitution, Article II, Section 2, Clause 2

He (President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

STATEMENT OF THE CASE

The initial jurisdiction and decision in this case rested with the OPM, Retirement and Insurance Programs, Washington, DC. The OPM decision on March 7, 1990, Case No. D1050706, was the result

of the Petitioner's request dated July 27, 1989 to make deposit to the Civil Service Retirement Fund for federal service performed during the period of September 7, 1954 to August 1, 1958 and others. OPM determined that a retirement fund deposit was not acceptable because "Service with the Merchant Marine Cadet Corps is not creditable towards retirement".

The Petitioner filed a timely request to OPM for reconsideration on March 23, 1990. The Petitioner claimed status as an "employee" of the US Government as defined by 5 U.S.C. § 790 (b) (4) (1952) as this statute was applicable to the Petitioner at the time of the claimed service. The OPM DENIED reconsideration on October 15, 1990.

The Petitioner filed a timely appeal on November 2, 1990 to the Merit Systems

Protection Board (MSPB), Atlanta Region, for review of the Initial Decision. The MSPB has jurisdiction over the appeal under 5 U.S.C. § 8347 (d) and 5 U.S.C. § 831.110. The MSPB Administrative Judge requested additional information from the Petitioner which was submitted on January 16, 1991. Among other claims, the Petitioner reasserted a claim that being designated an employee under 5 U.S.C. § 790 (b)(4) which limited the Petitioner's rights to sue the employer (US Government) was sufficient to provide employment status for retirement credit and other benefits of being an "employee". The Petitioner also claimed meeting the three point test of the current definition of "employee" codified in 1966 as 5 U.S.C. § 2105 (a). The Petitioner also claimed that an "employer/employee" relationship

was created by the Government by requiring the Petitioner to perform personal services of a kind similar to those being or had been performed by civil service employees called "Administrative Enrolles" for the protection, care, and maintenance of Government property. These services were not related to the Petitioner's primary function of training.

The MSPB Administrative Judge on February 28, 1991 issued Initial Decision No. AT08319110083 that AFFIRMED the OPM position and appears at **Appendix D**. The decision was primarily based upon 10 U.S.C. § 971 (b)(1) which forbids granting credit for any purpose for service as a midshipman or cadet at the four military academies. A COAFC decision supporting MSPB Administrative Judge's position was cited as Horner v. Jeffrey, 823 F.2d 1521,

1526 (Fed. Cir. 1987).

The Petitioner filed a timely petition for review by the full MSPB on March 8, 1991. The Petitioner restated previous claims and added that 10 U.S.C. § 971 (b) (1) was not relevant since the USMMA was a civilian institution and civilian service was being claimed. The MSPB DENIED the petition on June 11, 1991 which appears as **Appendix C.**

The Petitioner filed a timely petition to the Court of Appeals for the Federal Circuit for review of the MSPB initial decision. The jurisdiction of the COAFC is established by 5 U.S.C. § 7703.[1]

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[1] 5 U.S.C.2105 (1982) Note 8. Review Determination of whether person performing services is employee in action to determine eligibility for Government retirement benefits is not committed to agency discretion, but is subject to judicial review and relief by way of writ of mandamus. Jankovic v. United States,

The petition was docketed on June 27, 1991 as Case No. 91-3438. The Petitioner made substantially the same claims that (1) Petitioner was an employee as defined in 5 U.S.C. § 790 (b)(4) (1952) and its successor 5 U.S.C. § 8101; (2) Petitioner met the requirements of the current definition in 5 U.S.C. 2105 (a) (1966); and (3) civilian service was claimed and therefore 10 U.S.C. § 971 (b) (1) was not relevant.

The COAFC issued an opinion on March 17, 1992 which AFFIRMED the MSPB initial decision and appears as **Appendix A**. The COAFC agreed that 10 U.S.C. § 971 (b)(1) was not relevant. The COAFC rejected 5 U.S.C. § 790 (b)(4) as the controlling definition of "employee" stating that in Johnson v. Merit Systems Protection Board,

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384 F. Supp. 1355 (D.D.C. 1974)

812 F.2d 705, 709 (Fed. Cir. 1987) the COAFC observed *with respect to disability compensation*, that FECA and CSRA " are entirely separate schemes... with entirely different eligibility standards."[2] The COAFC agreed that the Petitioner met all the requirements of 5 U.S.C. § 2105 (a) including appointment by a Federal Official except that such appointment was not into the Civil Service. The COAFC left unanswered the Petitioner's specific question to define to what Federal service the Petitioner was appointed if the appointment was not the military or civil service.

The Petitioner filed a timely

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[2] The Court did not express an opinion with regard to the employment status of the petitioner because Johnson was an "employee" under both schemes and statutes.

Petition for Rehearing on March 27, 1992. The Petitioner reasserted the claim that the Government created an "employer/employee" relationship by requiring the petitioner to perform personal services similar to those of "Administrative Enrolles" which were unrelated to training. The petitioner also reasserted that 5 U.S.C. § 790 (b)(4) was the only legislated definition of employee and was therefore superior to any agency interpretation. The Petitioner also claimed and documented that the petitioner's appointment followed the traditional process for entering the competitive civil service at the time (1954). After the appointment and without the knowledge or fault of the Petitioner, Department of Commerce officials did not follow standard civil service procedure

and documentation to formalize the "employer/employee" relationship that was created. The COAFC DENIED the petition for rehearing on April 15, 1992 and issued a Mandate on April 22, 1992 which appears as **Appendix B**.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for several reasons. This Petition presents the issues of:

(1) Conflicts in the authority of the Office of Personnel Management (OPM) to interpret statute (CSRA, 5 U.S.C. § 693 and its successors) and create policy and procedures in apposition to the clear language of another statute (FECA, 5 U.S.C. § 790 and its successors) and the

interpretation, policy, and procedures of the Department of Labor Office of Workers Compensation Programs (DOL-OWCP);

(2) The COAFC Opinion in the instant case conflicts with other opinions of the same COAFC on the viability of an executive agency interpretation of statute, policy and procedures despite their longevity prior to judicial review when such interpretation of statute, policy and procedure conflicts with the plain language of another statute.

(3) The OPM interpretation of statute 5 U.S.C. § 2105 (a) and supporting COAFC opinion in the instant case is erroneous and contrary to the plain meaning of the statute and should not be followed because there are compelling reasons that it is wrong.

(4) The United States Supreme Court

is the **first and only** appellate level for cases which the Court of Appeals for the Federal Circuit has original jurisdiction.

CONFLICTS OF INTERPRETATION BETWEEN AGENCIES

The definition of "employee" in 5 U.S.C. § 693 (a) codified for Civil Service Retirement Act (CSRA) purposes during the period of service (1954-58) was not specific however a specific definition of "employee" was provided for the purposes of the Federal Employees Compensation Act (FECA) as 5 USCA 790 (b) (4) (1952) which was also applicable to the Petitioner.

The Petitioner's claim for service credit is based upon the definition of an "employee" at the time the services were performed, i.e., September 8, 1954 to

August 1, 1958. The definition in 5 USCA 790 (b) (4) (1952) and its successors was **specific, current, and applicable** to the petitioner when the service was performed and therefore should be the controlling statute. The current definition invoked in the CSRA was not codified as 5 USCA 2105 until 1966.

In the COAFC Opinion in the instant case the COAFC has agreed that the Petitioner has met the FECA definition as interpreted by the DOL and that the Petitioner performed personal services over and above training and these services were of a kind that had been and were being performed by Civil Service employees.

The Department of Labor Office of Workers Compensation Programs (DOL-OWCP) has determined that the Petitioner was a

Federal Employee for the purposes of the FECA and it was the exclusive remedy to seek compensation for injury or death regardless of fault. The Petitioner as a "federal employee" was thereby prohibited from suing the Government for injuries and the Government had only a limited liability.

The COAFC has observed in Johnson v. Merit Systems Protection Board, 812 F.2d 705, 709 (Fed. Cir. 1987) that with respect to disability compensation, the FECA and CSRA are "entirely separable schemes...with entirely different eligibility standards." The issue in the instant case is service credit for retirement and **not** disability compensation or disability retirement eligibility so the observation is not directly applicable. The fact is that the CSRA did

not have a specific statutorily defined eligibility standard until 1966 and the **only specific** definition of "employee" legislated by Congress was found under the FECA as 5 U.S.C. 790 (b)(4) (1952).

The OPM and its predecessor the Civil Service Commission used an agency standard from 1944 that was later codified but it should not have been superlative to the plainly expressed definition in the statute.

The OPM through a self-generated standard has granted CSRA service credit to military academy graduates for over forty years. The COAFC determined in Horner v. Jeffrey, 823 F.2d 1522 that this agency standard was not valid despite its longevity because it was in apposition to the plain language of an existing statute [10 USC 971 (b) (1)]. The same logic

should apply to discredit the agency standard as the definition for "employee" when a clear definition existed in a statute that also applied to the Petitioner.

The FECA contained the **only legislated** definition of an employee. Since this definition was approved by Congress and also was part of the US Code, that definition should have a superior position to an agency definition.

CONFLICTS IN COAFC DECISIONS

The COAFC has been inconsistent in its support or denunciation of the application of the CSC/OPM standard. In the instant case the COAFC has supported the CSC/OPM standard and cites various decisions.. However this same court also has renounced this standard in Horner v.

Acosta, 803 f.2d 687, 695 (Fed. Cir. 1986) and in Horner v. Jeffrey, 823 F.2d 1521, 1526 (Fed. Cir. 1987). The COAFC in this latter case stated at 1522:

6. United States
Provision of the federal personnel manual, which stated that service as a midshipman constituted military service for credit purposes, was issued without any legislative delegation of authority, interpreted statute that needed no interpretation, conflicted with statute, which states that in computing length of service for any purpose no officer of the Navy or Marine Corps may be credited service as midshipman at the United States Naval Academy and, therefore was invalid. 5 U.S.C.A. § 8331 (13); 10 U.S.C.A. § 971 (b).

7. United States
Longevity for 40 years of provision in federal personnel manual, which stated that service as a midshipman constituted military service for credit purposes, did not cure its invalidity based on conflict with statute, which states that in computing length of service for any purpose no officer of the Navy or Marine Corps may be credited with service as midshipman at the United States Naval Academy. 5 U.S.C.A. § 8331(13); 10 U.S.C.A. § 971(b).

It should be noted that OPM has not

incorporated this 1987 COAFC decision into the Federal Personnel Manual and based upon past erroneous interpretative opinion, practice and policy OPM continues to credit Federal military academy service for Civil Service retirement purposes.

OPM INTERPRETATION AND COAFC DECISION IS WRONG

As stated by the COAFC in Horner v. Jeffrey, 823 F.2d 1521 at 1531:

"Congress authorized OPM to administer the CSRA and to promulgate implementing regulations. 5 U.S.C. § 8347 (a). The long-standing interpretation placed on a statute by the agency charged with its administration should be followed *unless there are compelling indications that it is wrong*. E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-82, ...(other citations omitted). .... On the other hand the Supreme Court has observed that:

courts are the final authorities on issues of statutory construction. They must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are

inconsistent with the statutory mandate or that frustrates the policy that Congress sought to implement."

In the instant case and others the CSC/OPM standard was at most an interpretive regulation without the force of law and was invalid based on conflict with the plain language of 5 USC 790 (b) (4). "An interpretative regulation...is one issued...without delegated legislative power." Fmali Herb, Inc. v. Heckler, 715 F.2d 1385, 1387 (9th Cir.1983). Consequently the FECA definition should have been controlling in the instant case.

The CPM and COAFC Opinion in the instant case have accepted as fact that the Petitioner met all of the tests of employee status under 5 U.S.C. § 2105 (a) except that the Petitioner was not appointed to the Civil Service. The Petitioner was (1) appointed to

"something" by a Federal Official in an official capacity, (2) the Petitioner provided services that were a federal function and that were assigned and supervised by federal officials, and (3) the Petitioner was compensated from appropriated funds. The Petitioner was not a contractor and there was no third party involvement. The petitioners in other relevant cases were employees of contractors. See Horner v. Acosta, 803 F.2d 687 (1986); Costner v. United States, 665 F.2d 1016 (1981); Watts v.OPM, 814 F.2d 1576 (Fed. Cir. 1987); and Baker v. United States, 614 F.2d 263 (1980).

The OPM interpretation and COAFC decision is erroneous in that 5 U.S.C. § 2105 (a) does not specify any alternative except appointment to the Civil Service if the conditions are met. This definition

was developed with the cooperation and approval of the Department of Labor. An appointment by a Federal Official in an official capacity to serve a federal function supervised by federal officials ***can only be to the Civil Service*** or the military. Since the "something" was not the military, logic demands that it had to be the Civil Service.[3] [4]

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[3] Costner v. United States, 665 F.2d 1016 (1981) at 1021: ....In the Jankovic case [Jankovic v. United States, 384 F.2d 1355 (D.D.C. 1974)].... Jankovic was a translator for the State Department and had a contract which explicitly stated that he was not an employee. However, the District Court held that *as opposed to being employed by no one*, Jankovic was employed by the Government.... and in addition suggests that the Department was willfully circumventing its duty to employees....

[4] In Taylor v. Hampton, Civil Action No. 1178 (D.D.C. 1974), the Court held that the Government may not avoid employee status by the subterfuge of making employees "Grantees".

During the period of service the "traditional indicia" (GS rating, Position Description, Retirement Fund Contributions, etc.) of Civil Service "employee" status were not present for ANYONE employed at the USMMA and not until 1962 would staff members known as "Administrative Enrolles" be granted full and RETROACTIVE Civil Service status under 46 USCA 1126 (f) (4).

Although the petitioner's status was not traditional and typical of the competitive service, it was equivalent to that of "Administrative Enrolles" who were determined to be Civil Service employees despite the fact that they also lacked the "traditional indicia" of a Civil Service status.

The petitioner's appointment did however follow the traditional process of

entering the competitive Civil Service at the time. As documented in previous briefs to the COAFC, there was a "Vacancy Announcement" , Civil Service Examination, Civil Service Rating and Certification, Physical Examination, Civil Service approved selection process including a selection official, official notification of selection and orders to report for duty, "swearing in" ceremony and issuance of an employee identification card.

The entire process was under the direction and authority delegated to the Secretary of Commerce by the Congress. This appointment process was essentially identical to that of the competitive Civil Service and meets the requirements of 5 U.S.C. 2105 (a).

The COAFC has recognized that after the appointment the services performed by

the Petitioner were a federal function, were assigned and supervised by federal officials in an official capacity, and compensation was paid from appropriated funds. It is also a fact that these same federal officials did not follow the Civil Service form and format of Standard Forms 57 and 50, Position Descriptions, CSRA deductions, and other "traditional indicia" for **ALL** personnel assigned to the USMMA. The fact that these federal officials for whatever reason did not follow Civil Service rules of procedure or use standard forms is no fault of the Petitioner and the Petitioner should not be penalized for their actions.

U.S. SUPREME COURT APPELATE JURISDICTION

In the instant case and others that originate in the Court of Appeals for the

Federal Circuit, the U.S. Supreme Court is the first and only level of appeal. Recognizing that the Supreme Court calendar is full and replete with weighty constitution questions of great impact on the citizens and lower courts, a case from an individual may seem unimportant. However under our American concept of justice, everyone has a right to a day in court and at least one level of appeal. In this case the first day in court was at the Court of Appeals for the Federal Circuit. The first and only level of appeal is to the Supreme Court and which should accord some deference to granting a writ of certiorari.

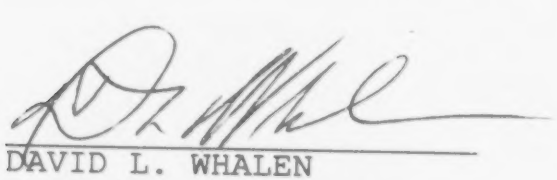
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review

the judgement and opinion of the Court of Appeals for the Federal Circuit on this matter. If the Supreme Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for the Federal Circuit for redetermination in light of the COAFC opinions in Horner v. Acosta, 803 F.2d 687, 695 (Fed. Cir. 1986); Horner v. Jeffrey, 823 F.2d 1521, 1526 (Fed. Cir. 1987); and Jankovic v. United States, 384 F.Supp 1355 (D.D.C. 1974).

DATED: June 12, 1992

Respectfully submitted,



DAVID L. WHALEN
Petitioner, pro se

APPENDIX A

Opinion

of the

United States Court of Appeals

for the

Federal Circuit,

WHALEN V OPM, 91-3438,

March 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING

JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED:

MARCH 17, 1992

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be

promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART

Clerk

WHALEN V OPM, 91-3438

(MSPB - AT08319110083

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

91-3438

DAVID L. WHALEN,

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

David L. Whalen, of Panama City, Florida, submitted Pro Se.

Lisa B. Donis, Mary S. Mitchelson, David M. Cohen and Murray M. Meeker, Commercial Litigation Branch, Department of Justice, of Washington, D.C., submitted for respondent.

Appealed from: Merit Systems Protection Board

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

91-3438

DAVID L. WHALEN, Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: March 17, 1992

Before NEWMAN, CLEVENGER, and RADER, Circuit Judges. NEWMAN, Circuit Judge.

David L. Whalen appeals the final decision of the Merit Systems Protection Board, Docket No. AT083191T0083, denying his request for service credit for

retirement purposes for time spent as a cadet-midshipman at the United States Merchant Marine Academy (USMMA). We affirm the Board's decision.

BACKGROUND

Mr. Whalen attended the USMMA from 1954 to 1958. Like all cadet-midshipmen Mr. Whalen received full subsistence and educational expenses from the government. As a cadet-midshipman he participated in academic studies, shipboard training, and the training of other cadet-midshipmen. He also performed various services in support of general maintenance of the USMMA, including assignments as waiter, groundskeeper, security guard, mail clerk, musician, janitor, dishwasher, and painter. Mr. Whalen asserts that these assignments, previously provided by the USMMA staff, were performed by

cadet-midshipmen when USMMA funding was reduced.

The Board held that Mr. Whalen's appointment to the USMMA was not an appointment in the civil service under 5 U.S.C. § 2105(a). The Board cited Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987) (en banc), and relied by analogy on 10 U.S.C. § 971. The Board held that the additional work done at the USMMA did not change the nature of the appointment and time spent, for retirement credit purposes.

A. Horner v. Jeffrey - Title 10

The Board held that Horner v. Jeffrey is controlling authority on the issue of crediting service as a USMMA cadet-midshipman for retirement purposes. In Jeffrey this court applied 10 U.S.C. §

971 (b)(1)[1] to preclude crediting, for civil service retirement purposes, attendance at the various United States military service academies. The Board held that while § 971 (b)(1) did not include service at the USMMA, the rationale of Jeffrey was applicable.

In Jeffrey the petitioner was seeking civil service retirement credit for his time as a midshipman at the United States Naval Academy, invoking 5 U.S.C. § 8332(c) which provided that under certain circumstances military service can be credited toward civil service retirement. This court held that since 10 U.S.C. § 971

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[1] 10 U.S.C. §971 (b) (1).

[N]o officer of the Navy, or Marine Corps may be credited with service as a midshipman at the United States Naval Academy or as a cadet at the United States Military Academy, United States Air Force Academy, or United States Coast Guard Academy.

(b)(1) barred crediting Jeffrey's time at the Naval Academy for any military purpose, the time could not be credited on that ground for civil service retirement purposes. The court referred to Congress' statements that counting military service academy time in computing length of military service would unfairly discriminate against those who pay for their own education, in favor of the graduate of a military academy who is educated at public expense. Jeffrey, 823 F.2d at 1526.

Applying this reasoning, the Board held that cadet-midshipmen at the USMMA, who are also educated at public expense, should be treated the same as those attending the military service academies. While we appreciate the symmetry of this position, the statutory support for the

conclusion is wanting. The USMMA is a civilian institution and is not subject to the provisions of 10 U.S.C. § 971. 10 U.S.C. § 971 (b)(1) is explicitly directed to attendance at the service academies of the armed forces, for the purpose of computation of military service. The USMMA is not a military academy and is not listed in § 971. It shall not be included by inference. See Johns-Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed. Cir. 1988), cert. denied 489 U.S. 1066 (1989) (absent clear legislative intent to the contrary, the plain meaning of a statute will prevail). Thus we do not adopt the Board's premise.

B. The Federal Employees Compensation Act

Mr. Whalen states that he is not seeking to characterize his service at the USMMA as military service, or analogous

thereto. Instead, he maintains that during the time he attended the USMMA he was a civil service employee for purposes of the Civil Service Retirement Act (CSRA). He states that he meets the definition of "employee" set in the Federal Employees Compensation Act (FECA), and that this was the only definition extant during the period at issue.

The CSRA defines "employee" with reference to 5 U.S.C. § 2105. Mr. Whalen argues that § 2105 did not exist in 1954-58, and that 5 U.S.C. § 790 (b)(4) (1952) provides the definition of "employee" appropriate to his case. § 790 (b)(4) (restated with modification at 5 U.S.C. § 8101(B) (1966)) stated that for purposes of FECA the term "employee" includes

> persons rendering personal services of a kind similar to

> those of civilian officers or employees of the United States to any department, independent establishment, or agency thereof (including instrumentalities of the United States wholly owned by it), without compensation or for nominal compensation, in any case in which acceptance or use of such services is authorized by an Act of Congress or in which provision is made by law for payment of the travel or other expenses of such person.

Mr. Whalen states that he meets this definition, for he performed "personal services of a kind similar to" those performed by USMMA staff who were designated as "Administrative Enrolles". Although Administrative Enrolles did not have civil service employment status in 1954-58, in 1961 full and retroactive civil service employment status was granted to USMMA Administrative Enrolles. 46 U.S.C. § 1126 (f)(4). In addition, Mr. Whalen maintains that the Department of

Labor - Office of Workers Compensation, charged with implementing the provisions of FECA, has determined that a USMMA cadet-midshipman is a federal employee for purposes of FECA.

The Board rejected Mr. Whalen's argument that 5 U.S.C. § 790 (b)(4) established the controlling definition of "employee" stating that the definition set for the purposes of FECA was not applicable to the CSRA. In Johnson v. Merit Systems Protection Board, 812 F.2d 705, 709 (Fed. Cir. 1987) this court observed, with respect to disability compensation, that FECA and CSRA "are entirely separate schemes . . . with entirely different eligibility standards."

Mr. Whalen argues that the FECA definition of "employee" applies because neither 5 U.S.C. § 2105 nor any

counterpart to that provision existed in 1954-58. 5 U.S.C. § 2105 was first enacted in 1966. It was not, however, without predecessor. In Watts v. Office of Personnel Management, 814 F.2d 1576 (Fed. Cir. 1987), cert. denied, 484 U.S. 913 (1987) this court determined that § 2105 made no change in the substantive requirements of status as an "employee" for retirement purposes. The court observed that the civil Service Commission had used since 1944 the same criteria as are stated in § 2105. Id. at 1580. See generally Stapleton v. Macy, 304 F.2d 954, 955 n.3 (D.C. Cir. 1962); H.R. Rep. No. 901, 89th Cong., 1st Sess. 3, 27 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess. 47 (1966). See also Jankovic v. United States, 384 F.Supp. 1355 (D.D.C. 1974) (§2105 applied to determine CSRA

employment status of service performed from 1950 to 1960); Curran v. Office of Personnel Management, 566 F.Supp. 1511 (D.D.C. 1983), aff'd, 735 F.2d 617 (D.C. Cir. 1984) (§2105 applied to service performed from 1949 to 1964); Costner v. United States, 665 F.2d 1016 (Ct. CI. 1981) (§ 2105 applied to service performed from 1949 to 1963).

We conclude that § 2105 provides the applicable definition of "employee" for retirement service credit, and not § 790 (b)(4), despite the classification of cadet-midshipmen as employees for Workers Compensation purposes.

c. Administrative Enrolles

Alternatively, Mr. Whalen argues that 46 U.S.C. § 1126 (f)(4) provides the statutory basis for granting civil service employment status to USMMA

cadet-midshipmen who performed services equivalent to those performed by USMMA Administrative Enrolles. In 1961 Congress amended § 216 of the Merchant Marine Act of 1936, codified at 46 U.S.C. § 1126, in order "to clarify the status of the faculty and administrative staff at the United States Merchant Marine Academy." This Act added subsection (f) to 46 U.S.C. § 1126, directing the Civil Service Commission to bring USMMA Administrative Enrolles into the civil service, and in subsection (f)(4) granting Administrative Enrolles retroactive civil service employment status for prior "active service". (Repealed in the Maritime Education and Training Act of 1980, Pub. L. No. 96-453, 94 Stat. 1997.)

The Board held that Mr. Whalen could not raise the argument that he was

entitled to service credit under § 1126 (f)(4) because the statute had been repealed before he sought to invoke its provisions. This approach to statutory construction is negated by 1 U.S.C. § 109, which provides:

> [the repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such ....liability.

The Maritime Education and Training Act of 1980 did not expressly extinguish the liability incurred by the government in connection with the employment status of Administrative Enrolles. However, the Board held, in the alternative, that even if § 1126 (f)(4) could be invoked and even if Mr. Whalen's time as a cadet-midshipman

at the USMMA could be classified as "active service", Mr. Whalen did not serve as an Administrative Enrolle. Administrative Enrolles, defined in 1952 by the Attorney General in connection with 46 U.S.C. § 1126, are different from cadet-midshipmen:

> These men [Administrative Enrolles] are enrolled for permanent, or at least indefinite, employment with the Maritime Service, do not ordinarily receive training to fit them for service on merchant vessels and do not at any time during their enrollment or by reason thereof serve on merchant ships. These men constitute in large part the administrative staff of the Maritime Service and some of them serve as instructors of the trainee enrolles.

41 Op. Att'y Gen. 115, 116-17 (1952). The Board determined that Mr. Whalen did not meet this definition: that his enrollment was neither permanent nor indefinite, but for the fixed four-year term of a

cadet-midshipman; that he received training to serve on merchant vessels, and did so serve during his enrollment; and that although he may have participated in the training of other cadet-midshipmen, the primary purpose of his service at the USMMA was to receive training.

The Board correctly held that Mr. Whalen was a cadet-midshipman, not an Administrative Enrolle. The provisions of § 1126 (f)(4) are specific to Administrative Enrolles. We discern no basis for extending to cadet-midshipmen the provisions of this statute.

D. Civil Service Retirement Act

Alternatively, Mr. Whalen argues that his service as a cadet-midshipman at the USMMA satisfies the present definition of "employee" for CSRA purposes:

> 5 U.S.C. § 2105 (a) For purposes of this title, "employee" means an . . .

individual who is - -

> (1) appointed in the civil service by one of the following acting in an official capacity--
>
> ***
>
> (D) an individual who is an employee under this section;
>
> ***
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

Mr. Whalen states that his service satisfies § 2105 (a)(1)(D) in that the Supervisor, United States Merchant Marine Cadet Corps, who appointed him and ordered him to report for duty, was an employee of the Maritime Administration, Department of Commerce and was acting in an official capacity. Mr. Whalen states

that § 2105 (a)(2) is satisfied by the services he performed relating to the training of other USMMA cadet-midshipmen, as the training of cadet-midshipmen is a federal function authorized by 46 U.S.C. § 1126; and that the services he performed unrelated to training were functions traditionally provided by civil service personnel, that is, USMMA Administrative Enrolles. Mr. Whalen states that § 2105 (a)(3) is satisfied in that the services he performed were requested, assigned, and supervised by civil service employees, that is, USMMA Administrative Enrolles; and that the Chief of Maritime Training, also a federal employee, had overall responsibility for the supervision and services performed by Mr. Whalen.

The Board held that Mr. Whalen's

appointment to the USMMA was not an appointment in the civil service in terms of § 2105 (a) (1) . The Board referred to the absence of the traditional indicia of civil service employment, such as a GS grade rating, and the absence of civil service retirement contributions. Mr. Whalen argues that his appointment to the USMMA must have been an "appointment in the civil service" because "except for the military, to what other service would a Federal official appoint someone?"

An appointment to the USMMA is not an appointment as an employee in the civil service. Such an appointment requires formality and process that did not occur here. See Costner, 665 F.2d at 1020 ("[a]n abundance of federal function and supervision will not make up for lack of an appointment"). While Mr. Whalen

argues that his appointment was equivalent to that of the USMMA Administrative Enrolles who were retroactivity designated as civil service employees despite the lack of traditional indicia in their initial appointments, this statutory designation was specific to Administrative Enrolles. It did not include cadet-midshipmen who may have done some similar work while at the USMMA. There is no basis for assuming or inferring that Congress intended otherwise. The Board correctly held that an appointment as a cadet-midshipman was not an appointment as an employee in terms of § 2105(a).

E. The Federal Personnel Manual

Mr. Whalen also argues that certain provisions of the Federal Personnel Manual (FPM) entitle him to retirement

credit for service time at the USMMA.

Mr. Whalen cites FPM Supplement 830-1 § 22A2.1-2B, dated September 1990, which states that service at the military academies of the United States is creditable military service for purposes of civil service retirement. Mr. Whalen asserts that it is unfair to credit service at the military academies while denying credit for service at the USMMA.

As the Board recognized, the cited section of the September 1990 FPM provision is contrary to this court's 1987 decision in Horner v. Jeffrey. The Office of Personnel Management states that the section of the FPM is in error and has not been applied. We share Mr. Whalen's concern at the continuing presence of this provision in the Manual.

Finally, Mr. Whalen cites FPM

Chapter 308, subchapter 2, which provides for a Cooperative Education Program under which "Student Trainees" are considered to be federal employees. Mr. Whalen asserts that his service at the USMMA is similar to that of a co-op student. The Board observed that co-op students receive specified excepted civil service appointments pursuant to 5 C.F.R. § 213.3202, and that no corresponding provision exists for USMMA cadet-midshipmen. The Board correctly held that the appointments are not comparable.

Costs

No costs.

AFFIRMED

APPENDIX B

Merit Systems Protection Board

Initial Decision

WHALEN V OPM AT08319110083

February 28, 1991

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DAVID L. WHALEN, DOCKET NUMBER
Appellant, AT08319110083
v.
OFFICE OF PERSONNEL MANAGEMENT, DATE:
Agency JUN 11 1991
(CSD 1 050 706)

David L. Whalen, Panama City, Florida, pro se.

John Panagakos, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY

the appellant's petition for review of the initial decision issued on February 28, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for

review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

David L.Whalen
Bay Point Box 28138
Panama City, FL 32411

By Regular mail to:

John Panagakos
Retirement Policy Division
Office of Retirement and Insurance Policy
Retirement and Insurance Group
Office of Personnel Management

P.O. Box 16
Washington, DC 20044

Marjorie Marks
Office of Personnel Management
Employee Relations Division
Room 7412
1900 E Street, N.W.
Washington, DC 20415

Merit Systems Protection Board
Atlanta Regional Office
401 West Peachtree Street, N.W. 10th Floor
Atlanta, GA 30308

By hand to:

Office of Special Counsel
1120 Vermont Avenue, N.W.
Washington, DC 20005

JUN 11 1991 /s/
(Date) Robert E. Taylor
Washington, DC

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DAVID L. WHALEN,
Appellant,

DOCKET NUMBER
AT08319110083

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency
(CSD 1 050 706)

Date: Feb 28, 1991

David L.Whalen, Panama City, Florida, pro se.

John Panagakos, Washington, D.C., for the agency.

BEFORE

Pamela B. Jackson
Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On November 2, 1990,the appellant, David L.Whalen, timely appealed from an October 15, 1990 Office of Personnel Management (OPM) decision, denying his request for service credit for time spent at the Merchant Marine Academy in Kings

Point, New York, from 1954 to 1958. The Board has jurisdiction over this appeal. 5 U.S.C. § 8347(d); 5 C.F.R. § 831.110.

The appellant bears the burden of proving by preponderant evidence that he is entitled to civil service retirement credit for the years in dispute. *Jeffrey v. Office of Personnel Management*, 37 M.S.P.R. 356, 358 (1988). The appellant did not request a hearing; therefore, this matter has been decided based upon the documentary evidence submitted by both parties. For the reasons set forth below, the OPM reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

1. The appellant's service as a Midshipman Cadet is indistinguishable from cadet service at other United States military academies; therefore, he is not entitled to service credit for that time.

The appellant seeks service credit for civil service retirement purposes for time spent at the Merchant Marine Academy. The appellant was a Midshipman-Cadet at the Merchant Marine Academy, Kings Point, New York, from September 8, 1954, to August 1, 1958 [1]

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[1]In OPM's reconsideration decision, it found that the appellant was not entitled to either military service credit for civil service retirement purposes or civil service credit for retirement purposes for his Midshipman Cadet service st the Merchant Marine Academy. The appellant has stated in his appeal before the Board, however that he seeks not military service

The controlling statutory provision in this matter is 10 U.S.C. § 971(b)(1) (1982). That section provides, in part, that "in computing the length of service for any purpose, no officer of the Navy or Marine Corps may be credited with service as a midshipman at the United States Naval Academy, or as a cadet at the United States Military Academy, United States Air Force Academy, or United States Coast Guard Academy, if he was appointed as a midshipman or cadet after March 4, 1913..." (emphasis added). Although this section does not speak to service as a Midshipman-Cadet at the Merchant Marine Academy, the rationale for excluding service at the above listed academies is equally applicable to the

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credit, but civil service retirement credit. (*See Appeal File, Tab 9*).

Merchant Marine Academy.

As recounted in *Horner v. Jeffrey*, 823 F.2d 1521, 1526 (Fed. Cir. 1987), the legislative history of the above-cited provision reflects Congress' view that counting cadet time in computing length of service would have the effect of discriminating against civilian employees who pay for their own education in favor of the graduate of a military academy who is educated at the public expense. Congress considered such a practice "as indefensible as it is illogical and unfair." *Id.* Thus, inasmuch as the Merchant Marine Academy is similar to other military academies in that the cadets are educated at public expense[2],

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[2] Graduates of the Merchant Marine Academy are awarded a Bachelor's of Science Degree upon completion of the four year program. (*See Appeal File, Tab 1);* 46 U.S.C. § 1126A-1 (1956); 46 U.S.C. §

notwithstanding the appellant's arguments to the contrary, I see no reason why those attending the Merchant Marine Academy should be treated any differently from those attending other military academies. Accordingly, I find that the appellant is not entitled to service credit for civil service retirement purposes for time spent as a Midshipman-Cadet at the Merchant Marine Academy.

2. Neither 5 U.S.C. § 790(b)(4) or 46 U.S.C. § 1126(f)(4) entitles the appellant to service credit for Midshipman-Cadet time.

The appellant claims entitlement to service credit for time spent in the Merchant Marine Academy under 5 U.S.C.§

1295b (g) (1981).

790(b)(4) (1952) and 46 U.S.C. § 1126(f)(4) (1936). Initially I note that 5 U.S.C. § 790(b)(4)(1952) was repealed in 1966[3], several years prior the appellant's 1990 retirement, and is therefore, in inapposite. Furthermore, 5 U.S.C. § 790(b)(4) sets forth a definition of "employee" as it pertains to individuals filing claims against the United States government for compensation for injuries.[4] I, therefore, find that that definition is not relevant in determining whether the appellant was an

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[3] Title 5 U.S.C. §790(b) (4) was repealed by Pub. L. No. 89-554, 80 Stat. 532 (1966).

[4] The definition of "employee" set forth in 5 U.S.C. § 790(b) (4) was restated in 5 U.S.C. § 8101 in 1966. Section 8101, like its predecessor, pertains to individuals filing claims against the United States government for compensation for injuries.

"employee" for civil service retirement purposes.

As to 46 U.S.C. § 1126(f)(4), that section, too, was repealed prior to the appellant's retirement and is, therefore, inapplicable.[5] Moreover, even if that section were applicable, I find that it does not entitle the appellant to service credit for Midshipman-Cadet time.

Title 46 U.S.C. § 1126(f)(4) provides, in part, that active service of any "administrative enrolle" performed prior to July 20, 1961, shall be considered creditable as civilian employment in the Federal government for all purposes. Assuming that the appellant's time as a Midshipman-Cadet could be classified as "active service",

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[5] Title 46 U.S.C. § 1126 was repealed in 1980 by Pub. L. No. 96-453, 94 Stat. 2009 (1980).

I do not find that he meets the definition of "administrative enrolle".

In 1952, the United States Attorney General issued an opinion as to whether the Civil Service Retirement Act was applicable to administrative enrolles of the United States Maritime Service. *See* 41 Op. Atty Gen. 115 (1952). Although the Attorney General specifically stated that the opinion did not address whether Cadet-Midshipmen in the Merchant Marine Cadet Corps were covered under the Civil Service Retirement Act, I find the Attorney General's definition of "administrative enrolle" instructive in this matter. The opinion defined "administrative enrolle" as used in 46 U.S.C. s 1126 as follows:

> These men are enrolled for permanent, or at least indefinite, employment with the Maritime Service, do not

> ordinarily receive training to fit them for service on merchant vessels and do not at any time during their enrollment or by reasons thereof serve on merchant ships. These men constitute in large part the administrative staff of the Maritime Service and some of them serve as instructors of the trainee enrolles....

Based upon the above definition, I find that as a Midshipman-Cadet, the appellant was not an "administrative enrolle". His enrollment in the Academy was neither permanent nor indefinite; rather, he was enrolled for a fixed four-year term. Furthermore, he received training to serve on merchant vessels, and actually served on a merchant vessel during one year of his enrollment. Although, the appellant may have on occasion participated in the training of other cadets, his primary purpose at the

Academy was to receive training[6]. For these reasons, I find that the appellant was not an "administrative enrolle" while a Midshipman-Cadet. Accordingly, I find that even if 46 U.S.C. § 1126(f)(4) were applicable to this matter, it would not confer entitlement upon the appellant to service credit for civil service retirement purposes.

3. The appellant does not meet the definition of "employee" under 5 U.S.C. § 2105.

The appellant further argues that as a Midshipman-Cadet, he met the definition

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[6] *See* the appellant's orders assigning him to the Merchant Marine Academy, Appeal File, Tab 9, which provides: "You are hereby directed to report to the U.S. Merchant Marine Academy, Kings Point, New York ... to commence the four-year course of study and training to qualify as a Merchant Marine and Naval Reserve Officer."

of "employee" under 5 U.S.C. § 2105. Except where otherwise specifically stated, that provision defines "employee" for all Title 5 purposes. One of the definitions of "employee" under § 2105 is an individual who was appointed in the civil service, by an individual who is an "employee" under that section, and who engaged in the performance of a Federal function under authority of law or an Executive, and was subject to the supervision of one who is an employee within the meaning of that section. The appellant argues that his service as a Midshipman-Cadet meets all of the above criteria, and therefore,he is an "employee" within the meaning of Title 5.

Contrary to the appellant's assertions, however, there is no evidence that his appointment to the Merchant

Marine Academy was an appointment to the "civil service." His appointment to the Merchant Marine Academy had none of the traditional indicia of a "civil service" appointment. For example, there is no evidence that the appellant was given a "GS" rating, and there is no evidence that he made civil service retirement contributions during that time. *See McDaniel v. Office of Personnel Management*, 41 M.S.P.R. 634, 636 (1989). I, therefore, find that the appellant has failed to establish that he was an "employee" within the meaning of 5 U.S.C. s 2105.

4. The appellant is not entitled to service credit under Federal Personnel Manual (FPM) Supplement 830-1 § 22A2.1-2B.

The appellant also argues that he is entitled to service credit for time spent in the Merchant Marine Academy under FPM Supplement 830-1 § 22A2.1-2B. The appellant is correct in his assertion that as late as September 21, 1990, the above cited provision reflected that service at the Naval, Military, Air Force, and Coast Guard Academies was considered military service for Civil Service Retirement System purposes. However, as stated in *Horner v. Jeffrey*, 823 F.2d at 1529, such a provision is contrary to the express provisions of 10 U.S.C. § 971(b), and is, therefore, invalid. For that reason, I find that the appellant is not entitled to service credit under OPM Supplement 830-1 § 22A2.1-2B. *Id.*

5. The appellant is not entitled to service credit under FPM Chapter 308, subchapter 2.

Finally, the appellant argues that his service as a Midshipman-Cadet was similar to that of students in the Cooperative Education Program described in FPM Chapter 308, subchapter 2. He contends that he should be entitled to service credit as a Midshipman-Cadet because co-op students are covered under the retirement system. I do not find the appellant's argument convincing. I do not find service at a military academy comparable to that of a co-op student. Co-op students are specifically given civil service excepted appointments pursuant to 5 C.F.R. § 213.3202. There is no corresponding provision granting such status to a Midshipman-Cadet of a

military academy. Moreover, as discussed above, there is a specific statutory provision, 10 U.S.C. § 971(b)(1), which prevents Midshipmen-Cadets from receiving military service credit or civilian service credit for such time. The appellant's argument, therefore, fails.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE

BOARD: _____

PAMELA B. JACKSON

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on APR 04 1991 unless a petition for review is filed by that date or the

Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to

applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
17 Madison Place, NW.
Washington, DC 20439

You may not file your petition with

the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition, for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

David L. Whalen
Bay Point Box 28138
Panama City, FL 32411

Agency Representative

John Panagakos
Technical Reference Branch
Retirement Policy Division
U.S. Office of Personnel

Management
P.O. Box 16
Washington, DC 20044

Other

Marjorie Marks
U.S. Office of Personnel
Management
Employee Relations Division
1900 "E" Street, N.W.
Room 7412
Washington, DC 20415

FEB 28 1991
(date)

Kathi M. Cannon
Legal Technician

APPENDIX C

United States Court of Appeals

for the Federal Circuit

Denial of the Petition for Rehearing

WHALEN V OPM , 91-3438

issued

April 15, 1992

UNITED STATES COURT OF APPEALS

FOR THE

FEDERAL CIRCUIT

91-3438

DAVID L.WHALEN, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

C-1

ORDER

Before NEWMAN, Circuit Judge, CLEVENGER, Circuit Judge, and NRADER, Circuit Judge.

A petition for rehearing having been filed in this case.

UPON CONSIDERATION THEREOF, it is

ORDERED that the prtition for rehearing be, and the same hereby is, denied.

The mandate will issue on April 22, 1992.

FOR THE COURT,

Dated: April 15, 1992

/S/
Francis X. Gindhart
Clerk

cc: DAVID L. WHALEN
LISA B. DONIS

FILED (Stamp)
US Court of Appeals
For The
Federal Circuit
APR 15 1992
Francis X. Gindhart
Clerk

WHALEN V OPM, 91-3438
(MSPB - AT08319110083)

APPENDIX D

Merit Systems Protection Board

Order

Denial of Petition for Review

of the

Initial Decision

WHALEN V OPM, AT08319110083

June 11, 1991

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DAVID L. WHALEN, DOCKET NUMBER
Appellant, AT08319110083
v.
OFFICE OF PERSONNEL MANAGEMENT,
Agency DATE: JUN 11 1991
(CSD 1 050 706)

David L. Whalen, Panama City, Florida, pro se.

John Panagakos, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on February 28, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

David L.Whalen
Bay Point Box 28138
Panama City, FL 32411

By Regular mail to:

John Panagakos
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By hand to:

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Washington, DC 20005

JUN 11 1991 /S/
(Date) Robert E. Taylor
Washington, DC

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

No. 91-2036

In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID L. WHALEN, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the fact that petitioner was an "employee" under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, while attending the United States Merchant Marine Academy, require the Office of Personnel Management (OPM) to find that he was also an "employee" for purposes of the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, and thus eligible for civil service retirement credit.

2. Whether, in the absence of a statutory definition of the term "employee" in the Civil Service Retirement Act prior to 1966, OPM's interpretation of that term is valid.

3. Whether petitioner's appointment to the United States Merchant Marine Academy was an appointment in the Civil Service within the meaning of 5 U.S.C. 2105.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2036

DAVID L. WHALEN, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 959 F.2d 924. The initial decision of the Merit Systems Protection Board (Pet. App. B5-B24) is unreported. The order of the Merit Systems Protection Board (Pet. App. B1-B4) denying petitioner's petition for review of the initial decision is unpublished, but the decision is noted at 48 M.S.P.B. 450 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. A petition for rehearing was denied

on April 15, 1992. The petition for a writ of certiorari was filed on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was enrolled as a cadet-midshipman in the United States Merchant Marine Academy (USMMA) from 1954 to 1958. In 1990, in an attempt to receive civil service retirement credit for the period during which he attended the USMMA, petitioner applied to the Office of Personnel Management (OPM) to make a deposit into the Civil Service Retirement System (CSRS) to cover his four-year USMMA enrollment. Pet. App. A6-A7, B5.

On March 7, 1990, OPM denied petitioner's request, stating that petitioner was not a federal "employee" within the meaning of the CSRS while at the USMMA, and that his enrollment was therefore not creditable under the CSRS. Petitioner requested that OPM reconsider its decision, and on October 15, 1990, OPM issued its decision on reconsideration reaffirming the denial of petitioner's claim. OPM explained that: (1) petitioner did not meet the statutory definition of "employee" contained in 5 U.S.C. 2105; (2) the Civil Service Commission (CSC) had issued a decision on May 19, 1947, in which it stated that enrollment as a cadet-midshipman at the USMMA did not constitute employment with the Federal Government; and (3) while the Merit Systems Protection Board (MSPB) had once ruled that attendance at one of the United States military academic institutions was creditable as military service pursuant to the CSRA, see *Jeffrey* v. *OPM*, 28 M.S.P.B. 81 (1985), that ruling had been reversed by the court of appeals. *Horner* v. *Jeffrey*, 823 F.2d 1521 (Fed. Cir. 1987) (en banc).

2. Petitioner appealed OPM's decision to the MSPB's Atlanta regional office. Petitioner asserted that his attendance at the USMMA should be credited for civil service retirement purposes for a number of reasons. Petitioner maintained that: (1) he met the definition of a government "employee" in the Federal Employees Compensation Act (FECA), 5 U.S.C. 790 (1952) (presently codified at 5 U.S.C. 8101); (2) while at the USMMA, he performed functions equivalent to that of an "administrative enrollee," and thus was eligible for retirement credit for his service, pursuant to former 46 U.S.C. 1126(f)(4) (1964), repealed, Pub. L. No. 96-453, § 3(d), 94 Stat. 2009;[1] (3) his USMMA service was comparable to that of students enrolled in cooperative education programs who received civil service retirement credit for their enrollment; and (4) he satisfied the definition of "employee" in 5 U.S.C. 2105 while at the USMMA.[2]

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[1] 46 U.S.C. 1126(f)(4) (1976) provided:

> On such date as may be fixed by the Civil Service Commission * * * persons then serving as administrative enrollees shall be brought into the competitive civil service or excepted civil service in accordance with the Civil Service Act and rules, and shall thereafter be compensated * * * subject to the following exceptions and conditions:
>
> (4) Active service of any administrative enrollee performed prior to the date specified in the first sentence of this subsection (f) shall be considered creditable as civilian employment in the executive branch of the Federal Government for all purposes * * *.

[2] 5 U.S.C. 2105 provides in pertinent part:

> (a) For the purpose of this title, "employee" * * * means an officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> * * *

On February 28, 1991, the MSPB affirmed OPM's decision. Pet. App. B5-B24. The MSPB analogized petitioner's enrollment in the USMMA to attendance at one of the United States military institutions, which under 10 U.S.C. 971(b)(1) is not creditable for purposes of the CSRS.[3] Pet. App. B7-B10. The legislative history of that statute establishes that Congress did not intend to permit service at a military academy to be credited towards civil service retirement benefits, because the military academies offered individuals an education provided at government expense. The MSPB ruled that the same reasoning should apply to attendance at the USMMA. Pet. App. B10.

The MSPB similarly rejected petitioner's other arguments. The board held that FECA did not define

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> (D) an individual who is an employee under this section
>
> * * *
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

[3] 10 U.S.C. 971(b)(1) provides that

> In computing length of service for any purpose * * * no officer of the Navy or Marine Corps may be credited with service as a midshipman at the United States Naval Academy or as a cadet at the United States Military Academy, United States Air Force Academy, or United States Coast Guard Academy.

Section 971(b)(2) and (3) similarly specify that no commissioned officer of the Army, Air Force, or Coast Guard may be credited for time in attendance at one of the military institutions.

"employee" for purposes of the CSRS (Pet. App. B10-B12), and that petitioner's service at USMMA was comparable neither to that of an administrative enrollee (Pet. App. B12-B15), nor to that of a student participating in a cooperative program (Pet. App. B19-B20). Moreover, the board found that petitioner had not satisfied the definition of "employee" in 5 U.S.C. 2105 while at USMMA, because there was no indication that he had been appointed into the civil service. Pet. App. B15-B17. The full MSPB denied petitioner's petition for review, finding that it did not meet the MSPB's criteria for review set forth at 5 C.F.R. 1201.115. Pet. App. B1-B4.

3. The United States Court of Appeals for the Federal Circuit affirmed. Pet. App. A1-A25. The court of appeals found that, because the USMMA is a civilian, rather than military, institution, the MSPB's comparison of the USMMA to the military academies was misplaced. Pet. App. A7-A10. The appellate court, however, agreed that petitioner was not an "employee" within the meaning of 5 U.S.C. 2105 while enrolled at the USMMA, and as a result could not receive CSRS credit for that time. Pet. App. A19-A23. The court stated that the definition of "employee" in FECA was not applicable to a determination of whether an individual was an "employee" for CSRS purposes. Pet. App. A13-A15.

The court of appeals rejected petitioner's argument that, because 5 U.S.C. 2105 was not enacted until 1966, it could not be used to determine whether petitioner was an employee from 1954-1958. Pet. App. A14. The court held that Section 2105 "made no change in the substantive requirements of status as an 'employee' for retirement purposes," Pet. App. A14, and that petitioner had not been an "employee" under Section 2105 while at USMMA because he had

not been "appointed in the civil service" as required by that provision. Pet. App. A22.

Finally, the court concluded that petitioner was not an "administrative enrollee" entitled to CSRS credit pursuant to 46 U.S.C. 1126(f)(4) (1976) (Pet. App. A15-A19), that there was no basis for extending benefits given to administrative enrollees to cadet-midshipmen (Pet. App. A18-A19), that any statements in the Federal Personnel Manual indicating that civil service retirement credit should be given for attendance at military academies were contrary to 10 U.S.C. 971 and thus could not be relied upon by petitioner (Pet. App. A23-A24), and that petitioner's enrollment at the USMMA was not similar to that of students in cooperative education programs who had been specifically appointed into the civil service and whose service was creditable under the CSRS (Pet. App. A25).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Therefore, further review is not warranted.

1. Petitioner contends that the definition of "employee" in the FECA, 5 U.S.C. 790(b)(4) (1952) (presently codified at 5 U.S.C. 8101), which included USMMA cadet-midshipmen during the time petitioner attended the USMMA, should govern in this case. Petitioner's claim rests upon the fact that, prior to 1966 and the enactment of 5 U.S.C. 2105, there was no statutory definition of "employee" for purposes of civil service benefit eligibility. Pet. 16-20.

Petitioner's contention is mistaken. FECA's definition of a cadet-midshipman as an "employee" eligible for workers' compensation benefits does not determine whether petitioner is an employee for

purposes of receiving civil service retirement credit. FECA and the CSRA represent two distinct statutory schemes that serve entirely different purposes. *Johnson* v. *Merit Systems Protection Board*, 812 F.2d 705, 707-709 (Fed. Cir. 1987). FECA benefits extend to a wide range of individuals who are not "employees" eligible for civil service retirement benefits as defined by 5 U.S.C. 2105,[4] and the plain language of FECA makes clear that its definition of "employee" is provided only "[f]or the purpose of *this* subchapter." 5 U.S.C. 8101 (emphasis added). In short, as the court of appeals found, the definition of "employee" under FECA is simply inapposite to a determination of whether an individual is an "employee" for purposes of the CSRS. Cf. *Costner* v. *United States*, 665 F.2d 1016, 1022 (Ct. Cl. 1981) (definition of "employee" pursuant to Fair Labor Standards Act not controlling in claim for annuity under the CSRA).

Petitioner's reliance (Pet. 19) on *Horner* v. *Jeffrey* is misplaced. In *Jeffrey*, the Federal Circuit ruled that a provision of the Federal Personnel Manual which gave civil service retirement credit for attendance at the nation's military academies was inconsistent with an existing statute. The court therefore held that, despite the fact OPM had been following the personnel manual provision for 40 years, that provision was invalid. *Jeffrey*, 823 F.2d at 1529-1530. In this case, by contrast, OPM's longstanding practice of refusing to give retirement credit for attendance at USMMA is not inconsistent with any statute or other source of law. Accordingly, that practice, which was validated for terms of employment

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[4] For example, FECA covers injuries sustained by individuals working in the logging and timber industries on the Menominee Indian Reservation in Wisconsin. 5 U.S.C. 8101(1)(c).

beginning in 1966 by Congress's enactment of 5 U.S.C. 2105(a), should be given full effect.[5]

2. Petitioner contends that he satisfied the requirements of 5 U.S.C. 2105 while attending the USMMA. He states that the court of appeals accepted that he had been appointed to "something" (Pet. 24) by a federal official, and that, since it is conceded that his appointment was not to the military, it must have been to the civil service.[6] Pet. 23-25.

Petitioner's argument does not take account of the fact that a federal official can confer a benefit or a status on an individual without appointing him either to the military or to the civil service. The Federal Circuit has explained that there must be a "significant degree of formality in the appointment process" to satisfy the requirements of Section 2105.

[5] The legislative history of the 1966 statute makes clear that Congress did not intend to make any changes in the substantive requirements which were already being used to determine CSRS eligibility. See H.R. Rep. No. 901, 89th Cong., 1st Sess. 3, 17 (1965); S. Rep. No. 1380, 89th Cong, 2d Sess. 47 (1966). Thus, the court of claims and the Federal Circuit have held that the definition of "employee" in 5 U.S.C. 2105 can be applied when making a determination whether an individual was an employee prior to the enactment of Section 2105 in 1966. See *Costner*, 665 F.2d at 1019 n.14; *Watts* v. *OPM*, 814 F.2d 1576, 1580 (Fed. Cir. 1987). See also *Stapleton* v. *Macy*, 304 F.2d 954, 955 n.3 (D.C. Cir. 1962); *Curran* v. *Office of Personnel Management*, 566 F.Supp. 1511 (D.D.C. 1983), aff'd, 735 F.2d 617 (D.C. Cir. 1984) (Section 2105 applied to pre-1966 service).

[6] Petitioner also states (Pet. 23) that the court of appeals found that he had satisfied "all of the tests of employee status under 5 U.S.C. 2105(a) except that the Petitioner was not appointed to the Civil Service." That statement is mistaken. The court of appeals merely restated petitioner's assertions that he had satisfied all three requirements of Section 2105 and then held that petitioner had not established that he had been appointed in the Civil Service in accordance with 5 U.S.C. 2105(a)(1). Pet. App. A20-A22.

Horner v. *Acosta*, 803 F.2d 687, 692 (Fed. Cir. 1986). The court has also noted with approval the MSPB's statement that, "at the very least, an intentional, unequivocal exercise of discretion by an appointing official to appoint an individual to a particular position" is necessary. *Acosta*, 803 F.2d at 692. Because "an appointment [to the civil service] requires formality and process that did not occur here" (Pet. App. A22), petitioner's appointment to the USMMA was not an appointment to the civil service.

Jankovic v. *United States*, 384 F.Supp. 1355 (D.D.C. 1974), does not support petitioner's argument. In *Jankovic*, the district court held that a Department of State contract employee was a government employee. The court reached that result in order to avoid creating the fiction that the contract employee had not been employed by anyone. Even if *Jankovic* had been rightly decided, petitioner was not an employee of the government, contract or otherwise, while at USMMA, and the reasoning of *Jankovic* accordingly would not apply here. In any event, however, the Federal Circuit and the Court of Claims have disapproved a broad reading of *Jankovic* as inconsistent with the language of Section 2105. *Acosta*, 803 F.2d at 694 n.11; *Costner*, 665 F.2d at 1021 n.20 ("[t]o the extent, however, that *Jankovic* can be read as not insisting on the appointment requirement, we decline to follow it").

3. Petitioner finally contends (Pet. 26) that his attendance at the USMMA was equivalent to the service of an "administrative enrollee," a category of individuals who, though lacking in formal appointments into the Civil Service, were subsequently given civil service retirement credit for the time they

worked at the USMMA by statute.[7] Petitioner did not enter the USMMA as an "administrative enrollee," but rather as a cadet-midshipman. Furthermore, although Congress passed legislation granting administrative enrollees civil service retirement credit for USMMA service, Congress did not grant—and there is no indication that Congress intended to grant—similar civil service retirement benefits to cadet-midshipmen such as petitioner. Cf. *Watts* v. *OPM*, 814 F.2d at 1579 ("Congress clearly did not intend to award retirement benefits to all persons who might be thought to deserve them. It can, itself, add to the entitlements it has created when it deems it right to do so.").

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[7] In 1961, Congress amended the Merchant Marine Act of 1936, 46 U.S.C. 1126, to clarify the status of certain staff members at the USMMA. Subsection (f)(4) of the statute granted retroactive civil service employment to administrative enrollees. Administrative enrollees were defined in an opinion of the United States Attorney General as those individuals "enrolled for permanent, or at least indefinite, employment with the Maritime Service, [and who] do not ordinarily receive training to fit them for service on merchant vessels * * *. These men constitute in large part the administrative staff of the Maritime Service." 41 Op. Att'y Gen. 115, 116-117 (1952). 46 U.S.C. 1126(f)(4) was repealed in the Maritime Education and Training Act of 1980, Pub. L. No. 96-453, § 3(d), 94 Stat. 2009. Petitioner was not an administrative enrollee because he was enrolled at the USMMA for a definite period and was required to serve on a merchant vessel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992